

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Amendment of the Commission's	)	WT Docket No. 97-82
Rules Regarding Installment Payment	)	
Financing For Personal Communications	)	
Services (PCS) Licenses	)	

**PETITION FOR STAY**

**I. Introduction and Summary**

Urban Comm-North Carolina, Inc. ("Urban Comm"), pursuant to section 1.41 of the Commission's rules, 47 C.F.R. § 1.41, and Section 416(b) of the Communications Act, 47 U.S.C. § 416(b), respectfully requests that the Commission stay the election date regarding C block financing options provided in the Order on Reconsideration of the Second Report and Order<sup>1</sup> (the "Reconsideration Order") in the above-captioned proceeding. The Reconsideration Order requires C block licensees to make an election from a menu of options for financing their license debt obligations by no later than June 8, 1998. However, the integrity and viability of that decision has been seriously called into question by the recent federal bankruptcy court ruling involving the largest C block licensee.<sup>2</sup> On May 8, 1998, numerous parties petitioned for reconsideration of the Reconsideration Order and requested material changes to license payment options in light of the GWI decision. The parties requested the Commission to establish a framework of options for C

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<sup>1</sup> In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82, FCC 98-46, 63 Fed. Reg. 17111 (April 8, 1998).

<sup>2</sup> In re GWI PCS, Inc., No. 397-39676-SAF-11 (Bankr. ND.Tex.; Bench Ruling, April 24, 1998) ("GWI decision").

block licensees that favors build out of PCS networks over current incentives to seek alternative financing arrangements through bankruptcy proceedings.

Changed circumstances resulting from the GWI decision are not the only developments warranting the grant of a stay. C block licensees must make a critical election--which will irrevocably and materially affect their business plans--with a high degree of uncertainty, as the Commission has yet to resolve certain key issues. Specifically, the Commission has not resolved the procedural and substantive issues regarding coordination with the Department of Justice ("DOJ") in implementing the financing options adopted by the Reconsideration Order and has not concluded a proceeding on designated entity control group and attribution rules.<sup>3</sup> Accordingly, and for the reasons set forth herein, the Commission should stay the June 8, 1998 election date until a date not less than thirty days following : (1) resolution of procedural and substantive issues regarding the role of the DOJ in implementation of the Commission's financing options; (2) Commission action on pending control group ownership and affiliation rules for designated entities; and (3) Commission action on the petitions for reconsideration filed in the wake of the GWI decision.

## **II. The Legal Standard**

In determining whether to stay the effectiveness of an order, the Commission applies the following four factor test in which it must consider: (1) the petitioner's likelihood of prevailing on the merits; (2) irreparable harm to the petitioner in the absence of a stay; (3) whether a stay will

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<sup>3</sup> In the Matter of Amendment of Part 1 of the Commission's Rules-- Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Proposed Rule Making, WT Docket No. 97-82, FCC 97-413, paras. 185-187 (December 31, 1997).

injure other parties; and (4) whether a stay is in the public interest.<sup>4</sup> This test was established in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958) and modified in Washington Metro Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). Washington Metro relaxed the first prong of the test from a wooden "probability" requirement toward a more flexible approach that measures the necessary degree of probability of success against an assessment of the other three factors. If the other three factors favor relief, a stay should be granted if the movant has made a substantial case on the merits.<sup>5</sup> The Commission recognizes that a stay may be granted based on a high probability of injury and some likelihood of success or vice versa.<sup>6</sup>

### **III. The Merits of a Stay Have Been Conceded by the Commission**

On March 30, 1998, Chairman Kennard wrote a letter responding to inquiries from the leadership of the House Commerce Committee concerning the disposition of certain issues which are critical to the business decisions C Block licensees must make before the election date. Specifically, he stated that the Commission would "ensure adoption of the rules well in advance of the debt financing election date." These outstanding issues are: (1) proposed rule changes regarding attribution and control groups for designated entities and (2) coordination with the Department of

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<sup>4</sup> Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Memorandum Opinion and Order, 12 FCC Rcd 21872, DA 97-2622, CC Docket No. 96-128, (December 17, 1997) ("PCIA Stay Order").

<sup>5</sup> Washington Metro, 559 F.2d at 843-844.

<sup>6</sup> PCIA Stay Order, at n. 22, citing Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985).

Justice on implementation of the Commission's financing options adopted in this proceeding. Despite these pronouncements by the Chairman, the Commission has not yet provided C block licensees with critical information pertinent to their debt financing election date decision. Full information is necessary before C block licensees are locked into business decisions that will shape their ability to roll out PCS to the public and fulfill the promises of wireless competition from small businesses, mandated by Congress in 47 U.S.C. § 309(j).

Furthermore, the recent GWI decision introduces even more uncertainty into the financial marketplace as investors and C block licensees consider the attractiveness of a "fifth option" of bankruptcy. GWI's avoidance of approximately 84% of its winning bid amount and retention of the beneficial ownership and use of licenses<sup>7</sup> is the type of restructuring option many C block licensees petitioned the Commission to provide in its reconsideration of both the Second Report and Order and the Reconsideration Order. These changed circumstances combined with the uncertainty surrounding the key issues that have yet to be resolved by the Commission overwhelmingly support granting a stay.

#### **IV. Urban Comm Will Suffer Irreparable Harm if a Stay Is Not Granted**

Making an election is a one time only option. A business decision made without the benefit of full information as to the Commission's rules is not reversible. "The very thing which makes an injury 'irreparable' is the fact that no remedy exists to repair it."<sup>8</sup>

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<sup>7</sup> In re GWI PCS, Inc., No 397-39676-SAF-11 (Bankr. ND. Tex.; Bench Ruling, April 24, 1998).

<sup>8</sup> Banercroft Clothing Co., Inc. v. Renegotiation Bd., 466 F.2d 345, 366, at n. 9 (D.C. Cir. 1972), rev'd on other grounds, 415 U.S. 1 (1974), vacated, 466 F.2d and 495 F.2d

The difficulties facing many C block licensees, including Urban Comm, are well known to the Commission and are well documented in the proceeding.<sup>9</sup> Investors have been, and continue to be, hesitant to enter into financing arrangements with entrepreneur C Block licensees. Market uncertainty and the fact that the Commission has yet to resolve certain key issues make financial arrangements even more difficult. The addition of a Chapter 11 bankruptcy option also contributes to the tenuous nature of any business decisions and to the current market conditions. Such uncertainty affects the very viability of Urban Comm and other C block entrepreneurs. Requiring entrepreneur C block licensees to make irrevocable business decisions in an environment of serious regulatory uncertainty is certain to result in irreparable injury.

**V. A Stay Would Not Harm Other Interested Parties and Is in the Public Interest**

Other C block licensees should welcome a stay. A stay will provide additional time for licensees to assess options and to make sound business decisions once the key pending issues set forth above are resolved.

Potential reauction participants are too speculative a class to be harmed by a stay. At this time, there is no way to even determine who will be eligible to participate in the reauction. This is separate and apart from the problem of determining who, ultimately will be granted licenses upon reauction. Absent a cognizable group of licensees, there can be no ascertainable injury.

The public interest is defined by the Commission's congressional mandate. The Commission

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1074 (D.C. Cir. 1974).

<sup>9</sup> See Petition for Reconsideration, WT Docket No. 97-82, Urban Communicators PCS Limited Partnership, Nov. 24, 1997; Comments, WT Docket No. 97-82, Urban Communicators PCS Limited Partnership, June 23, 1997.

must fulfill its statutory obligation under 47 U.S.C. § 309(j) to make opportunities available to small businesses. By avoiding concentration of licenses and by disseminating them among a wide variety of applicants, including small businesses, the Commission is to promote economic opportunity and competition. 47 U.S.C. §309(j)(3)(B). Economic opportunity and competition will be served by granting a stay because it will allow C block licensees to be viable competitors in the wireless markets and will allow consumers to receive valued services at reasonably competitive prices.

## **VI. Conclusion**

For the foregoing reasons, the Commission should stay the June 8, 1998 election date until a date not less than thirty days following : (1) coordination with the DOJ on implementation of the Commission's financing options; (2) Commission action on pending control group ownership and affiliation rules for designated entities; and (3) Commission action on the petitions for reconsideration filed in the wake of the GWI decision.

Respectfully submitted,



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May 29, 1998

**Certificate of Service**

I, Kathy Nickens, a secretary in the law firm of Rubin, Winston, Diercks, Harris & Cooke do hereby certify that on this 29th day of May, 19998, a copy of the attached Petition for Stay was mailed via U.S.Post Office, first class postage prepaid, to the following:

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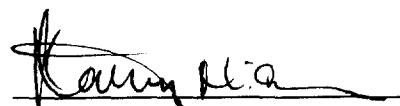
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